Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1995

VERN HERZOG, JR.,

Petitioner,

v.

PAUL S. DAMRON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In holding that a previously terminated attorney-client relationship re-attaches when an attorney advises a new client whose interests are antagonistic to a former client's, about a matter which is substantially similar to the matter about which the attorney had advised the former client, did the Ninth Circuit Court of Appeals properly predict what the decision of the Supreme Court of Idaho would have been had the issue been before that Court or did it instead impose its own judgment of what Idaho's law ought to be in this diversity case and thus so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's supervisory power?

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OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

1. Memorandum Decision and Order of the Honorable Edward J. Lodge, United States District Judge, entered December 9, 1993 in the United States District Court for the District of Idaho in the instant proceeding, Case No. CV-93-0105-E-EJL. The District Court Opinion is unreported and appears in **Appendix B** hereto.

2. The Opinion of the United States Court of Appeals for the Ninth Circuit, entered September 26, 1995, Case No. 94-35043, is reported at 67 F.3d 211 (1995) and appears in **Appendix A** hereto.

STATEMENT OF BASIS FOR JURISDICTION

1. The Opinion of the Court of Appeals for the Ninth Circuit reversing the December 9, 1993 Decision and Order of the U.S. District Court for the District of Idaho, was filed on September 26, 1995.

2. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The District Court had jurisdiction of this case under 28 U.S.C. § 1332, and the Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

In 1982, Respondent Paul Damron ("Damron") hired an Idaho attorney, Petitioner Vern Herzog, Jr. ("Herzog")

to prepare documents for the sale of his businesses to Richard, Patricia, Wayne and Marie Wheatley ("the Wheatleys"). Herzog drafted a stock purchase agreement which Damron and the Wheatleys signed in June, 1982 (the "Stock Purchase Agreement"). In drafting the Stock Purchase Agreement, Herzog acted as Damron's attorney, but this relationship ended in 1982. Herzog did no legal work for Damron after that.

In 1984, Damron sued the Wheatleys over entitlement to tax returns allegedly due the businesses they had bought from him. Herzog did not represent anyone in that litigation.

In 1991, Richard and Patty Wheatley asked Herzog about the Stock Purchase Agreement. They believed there were debts of the businesses they had purchased which Damron had not disclosed in 1982 and which they were entitled to offset against their remaining payments to him. Herzog reviewed the Stock Purchase Agreement and agreed. On March 29, 1991, Herzog wrote to Damron, stating that " . . . I am advising the Wheatleys to discontinue any further payment under the contract. . . . " It is conceded that no confidential information of Damron's was ever imparted by Herzog to the Wheatleys.

The Wheatleys suspended their payments. Damron then moved against his security. The Wheatleys retained new counsel and on August 20, 1991 filed a lawsuit against Damron to forestall the foreclosure and to enforce their right of offset against him (hereafter, the "1991 Litigation"). That lawsuit was settled by a compromise agreement the parties signed on June 4, 1992, and dismissed. Damron made no protest, either formally or

informally, during the 1991 Litigation about the Wheatleys having consulted Herzog.

Damron filed the present lawsuit against Herzog on March 26, 1993, claiming as damages his legal fees incurred in the 1991 Litigation and other losses allegedly suffered as a result of his settlement with the Wheatleys.

Herzog moved for summary judgment which was granted on December 9, 1993 (see **Appendix B**). The District Court held that the only duty which an attorney continues to owe a former client after the termination of their attorney-client relationship, the breach of which would support a civil lawsuit for pecuniary damages, was a fiduciary duty of confidentiality. Since it was agreed that no confidences of Damron were ever disclosed to the Wheatleys, the Court held that no suit for damages could be sustained.

Damron appealed and the Ninth Circuit reversed the District Court on September 26, 1995 (**Appendix A**) ruling that when an attorney advises a new client whose interests are adverse to those of a former client, about a matter which is "substantially related" to the matter about which the attorney advised the former client, the attorney creates, "a situation in which the attorney-client relationship re-attaches. Under such circumstances, . . . the duty of loyalty must continue after the representation [of the prior client] is complete in the same way the duty of confidentiality continues. Because the duty of loyalty continues in this respect, Damron argues, Herzog should be subject to a malpractice action for

breach of that duty. We agree." 67 F.3d 213, 214 (**Appendix A**, p. 9). The matter was remanded to the District Court for trial.

LEGAL ARGUMENT

This Court should decide whether the judicial reasoning employed by the Court of Appeals so far departed from the accepted and judicial course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The general rule, which the District Court followed, is that once the attorney-client relationship has terminated, the only duty which the attorney continues to owe to his former client, the breach of which will support a civil cause of action for pecuniary damages, is the fiduciary duty of confidentiality. 1, Mallen & Smith, *Legal Malpractice* (3rd Ed.), § 13.23 at pp. 803, 804. *See*, also, *Stockton Theaters, Inc. v. Palermo*, 121 Cal. App. 2d 616, 624, 625, 626, 264 P.2d 74, 81, 82 (Cal. 1953); *Oar Lock Land & Cattle Company v. Crowley*, 253 Mont. 336, 340, 833 P.2d 146, 148, 149 (1992); *Lazy Seven Coal Sales, Inc. v. Stone & Hines*, 813 S.W.2d 400, 404, 405 (Tenn. 1991).

No reported Idaho case has dealt with this question of an attorney's duties to successive, adverse clients. The Ninth Circuit therefore certified the question to the Idaho Supreme Court. 67 F.3d 213 (**Appendix A**, p. 7). The Idaho Court rejected that certification and the Ninth Circuit went on to answer the question itself.

The proper task of the Court of Appeals in this diversity case is not to declare what it thinks Idaho's law

should be but instead to try to predict how the Idaho Supreme Court would rule if the case were actually before it. *J.C. Wyckoff & Associates v. Standard Fire Insurance Company*, 936 F.2d 1474, 1485, reh'g denied (6th Cir. 1991); *Lawrence v. Virginia Insurance Reciprocal*, 979 F.2d 1053, 1055 (5th Cir. 1992).

Idaho has not recognized a cause of action such as Damron proposed or one analogous to it. "If a party's state claim is not one which would be recognized under state law as it presently exists, a federal court cannot according to its own sense of what is best expand such law so as to recognize the claim. It is only where the federal court can reasonably 'predict' that the state's highest court applying its presently existing law would recognize such a claim, that the federal court can do so." *Ball v. Joy Manufacturing Company*, 755 F.Supp. 1344, 1350, 1351 (S.D. W. Va. 1990), affirmed 958 F.2d 36, cert. denied, 112 S.Ct. 876, 502 U.S. 1033, 116 L.Ed. 2d 780. When a federal court is confronted with a choice between an interpretation of state law which would reasonably restrict liability and one which greatly expands it, the Federal Court should chose the narrower and more reasonable path. *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1412, reh'g and suggestion for reh'g denied (7th Cir. 1994), cert. denied, 115 S.Ct. 359, 130 L.Ed 2d 312.

Where, as here, a question in a diversity case has not been answered by the state's decisions or statutes, the federal court may look to analogous state court decisions, public policy imperatives, and other sources of authority to enable it to predict what the state's highest court would do. *Burns v. International Insurance Company*, 929 F.2d 1422, 1424 (9th Cir. 1991); *Santana v. Zilog*, 878

F.Supp. 1373, 1376 (D. Idaho 1995). Although Idaho has not squarely answered the question at hand, there was substantial relevant authority to be found in the decisions of that state, none of which was considered by the Court of Appeals.

First, and most basically, Idaho holds that the *existence* of an attorney-client relationship is indispensable to a legal malpractice action. It has consistently defined an attorney's professional duties in terms of the party who *is*, not *was*, his client. *See, e.g., Beal v. Mars Larsen Ranch Corporation, Inc.*, 99 Idaho 662, 667, 668, 586 P.2d 1378, 1383, 1384 (1978); *Johnson v. Jones*, 103 Idaho 702, 706, 652 P.2d 650, 654 (1982).

Herzog undisputedly finished his work for Damron and their attorney-client relationship terminated in 1982. The duty to exercise due care incident to the attorney-client relationship ended at that time. 1 Mallen & Smith, *Legal Malpractice*, (3d. Ed.) § 8.2, p. 410, 411. Idaho holds that an attorney does not owe a duty of care to one who is not a client. *Bell v. Bell*, 122 Idaho 520, 528, 529, 835 P.2d 1331, 1339, 1340 (Ct. App. 1992).

Idaho Bank & Trust v. First Bancorp, 115 Idaho 1082, 1084, 772 P.2d 720, 722 (1989) defined the criteria under which Idaho accountants would be liable to non-clients. That opinion relied on *Credit Alliance v. Arthur Anderson & Company*, 493 N.Y.Supp. 2d 435, 443, 483 N.E.2d 110, 118 (1985) and this should have invited the Ninth Circuit to refer to New York law to help predict how Idaho would regard a professional's liability to non-clients. In *Prudential v. Dewey, Ballantine, et al.*, 80 N.Y.2d 377, 605 N.E.2d 318 (1992), New York applied the criteria of *Credit Alliance*

Corporation to legal malpractice actions. However, *Prudential* specifically required that the non-client claimant have been the known and intended beneficiary of the attorney's work which is alleged to have been negligently performed. The fact that the situation at bar has nothing to do with the narrow exception to the requirement of attorney-client privity allowed in *Prudential* should have been a clear indicator that the Supreme Court of Idaho would not have entertained Damron's claims, had the Ninth Circuit pursued such predictive reasoning.

The Idaho Supreme Court rejected the Circuit's certification of the question at bar. In *Doe v. Cutter Biological*, 852 F.Supp. 909, 917 (D. Idaho 1994), the Honorable Harold Ryan was confronted with a similar rejection of a question certified to the Idaho Supreme Court. Judge Ryan inferred from this that the presently enunciated law of Idaho, which did not specifically provide for the new cause of action the plaintiffs in that case were proposing, would not likely be expanded by the Idaho Supreme Court and he was therefore in no position to do it himself. In contrast, the Ninth Circuit in this case failed to attach any significance to the rejection of certification.

The District Court founded its decision on the general rule stated in 1 Mallen & Smith, *Legal Malpractice*, § 13.23, as noted above. *See*, **Appendix B**, p. 21. But the Court of Appeals did not even mention this treatise, despite the fact that the courts of Idaho have relied on it to decide legal malpractice questions before. *See, Sohn v. Foley*, 125 Idaho 168, 172, 868 P.2d 496, 500 (App. 1994); *Waechter v. Mitchell*, 124 Idaho 283, 285, 858 P.2d 822, 824 (App. 1993); *O'Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134, 139 (App. 1990).

The Ninth Circuit referred to Idaho Rules of Professional Conduct (IRCP) 1.9 which abjures attorneys not to represent new clients whose interests are adverse to those of former clients, in any matter substantially similar to the original representation. The Court of Appeals noted, but placed little weight on the imprecation in Rules' Preamble that they should not be used in connection with civil suits for damages. 67 F.3d 215; Appendix A, pp. 13, 14. It also failed to acknowledge that the Preamble was adopted by the Idaho Supreme Court at the same time as the Rules themselves (*See*, **Appendix C** which contains the adopting Order, the Preamble and selected pages of the Rules themselves). The Preamble is thus an expression of the Idaho Supreme Court's intent to separate ethical rules of conduct from lawsuits seeking money damages. Herzog believes this was yet another predictive tool which the Ninth Circuit could have employed had it tried to anticipate how the Idaho Supreme Court might rule on this question rather than being intent upon declaring the law of Idaho itself.[1]

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[1] The Circuit cites to Section 72 of the *Restatements of the Law Governing Lawyers*, Comment c (at 67 F.3d 215, fn. 2; Appendix A, pp. 13, 14), generally holding that a conflict between an attorney and an ex-client may be the foundation for a malpractice action. The Court then stated that while Idaho has not adopted the proposed statement, other courts have. The inference is, presumably, that since other states have adopted this authority, Idaho probably should too. But the Ninth Circuit ignored the fact that in *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 149, 150, 804 P.2d 319, 322, 323 (1990), the Idaho Supreme Court said that, "rather than categorically adopting an entire chapter of the *Restatement* [of Judgments], this Court has consistently displayed its preference for selectively examining various sections and comments from the *Restatement* and thereafter

The Ninth Circuit identified the general duty of care Idaho requires its attorneys to render to their "clients," but made no effort to marshall any more focussed Idaho authority and extrapolate from it to decide how the Idaho Supreme Court would decide the novel question at bar. The nearest it came to predicting Idaho law was to say (at 67 F.3d 213 and 214; Appendix A, pp. 8 and 11) that it did not think any "drastic extension" of Idaho law was necessary to vindicate Damron, and that (at 67 F.3d 214; Appendix A, p. 11) its holding was "a natural complement to the law as defined by Idaho courts."

Idaho has not recognized any situation where a previously terminated attorney-client relationship may be resurrected by the unilateral actions of the former attorney. The available authority indicates that Idaho would not allow such a new and novel argument to support a legal malpractice action for money damages by a former client.

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adopting, citing favorably or rejected the provision, as the occasion warrants . . . this approach provides us with an opportunity to thoroughly explore the advantages and disadvantages of any given section on a case-by-case basis, what may be examined in the context of a specific set of facts [fn. 3, The common law, like an ongoing novel of fiction, is best written a single sentence at a time. In such wise, the judge, like the author, is not surprised by the ending.]" The Ninth Circuit thus displays its disdain for Idaho law by referring to authority that Idaho has stated will be accepted only on a very selective basis, if at all.

CONCLUSION

Under Rule 10 of the Supreme Court, a Petition for Certiorari will be granted only for compelling reasons. Being unable to find any clear indication that Idaho's law would accept Damron's new cause of action, the District Court granted summary judgment to Herzog. But the Ninth Circuit reversed this decision on the basis of the "common law" which it believed would be receptive to Damron's argument. Rather than predict the evolution of Idaho law, the Court of Appeals merely said that its decision was not a "drastic extension" of it but a "natural complement" to Idaho's law. It then went on to make a broad statement that the "common law" should now allow the resurrection of an attorney-client relationship that had been terminated years before and that a cause of action for monetary damages could be posited upon such claim without a showing of anything more than the existence of antagonistic interests between the attorney's two, successive clients over "substantially similar" matters. This, despite the additional fact that none of the authority from states other than Idaho cited by either the Ninth Circuit or Damron actually sanctioned a financial recovery based upon such a cause of action.

The potential for mischief posed by the Court of Appeal's decision is enormous. For example, Motions to Disqualify often have great tactical significance in litigation. *See*, for example, *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992). But by making the breach of the "duty of loyalty" the entré for a direct lawsuit for pecuniary damages, the Ninth Circuit now invites all former clients who later confront their old attorneys as adversaries across the courtroom to not only move the court to

disqualify them as their opponent's counsel, but also to file a lawsuit directly against those attorneys for that reason alone, seeking as damages the very fees which the original lawsuit will accumulate.

Under the Ninth Circuit's reasoning, such a breach of the "duty of loyalty" would allow a civil action against the attorney even if no motion to disqualify was ever filed. In such a circumstance, the attorney would be conscious that his vigorous representation of his present client would inevitably increase the legal fees, and hence the damages which would later be sought from him, personally, in the separate professional malpractice lawsuit which would be brought by his former client (which, additionally, could be brought whether the original lawsuit was won or lost by the former client). That circumstance, in itself, could be seen as a conflict of interest between the attorney and his present client, even though no objection is made to that representation by his former client.

Indeed, there is nothing to prevent the institution of a lawsuit for civil malpractice by former clients against their old attorneys *simultaneously* with the filing of the motion to disqualify the same attorneys in the lawsuit where they are representing new clients. If all that is required is a showing that the "duty of loyalty" had been breached, then there is a tactical incentive to bring such lawsuits, especially when motions to disqualify might meet a jaded response from a trial judge, but a legal malpractice action would be tried to a lay jury.

By sanctioning a cause of action based on the violation of ethical standards, but requiring nothing more, the

Ninth Circuit also dilutes the ability as well as the incentive for the legal profession to police itself, a characteristic which the Idaho Supreme Court finds to be one of the profession's unique hallmarks (Preamble, **Appendix C**, p. 33).

By disregarding the law of Idaho, the Ninth Circuit inevitably created a new cause of action that had little connection to that law. Consequently, problems and contradictions will be created to not only bedevil the courts, but also to vex attorneys and needlessly restrain the vigorous representation of clients by vastly expanding the scope of malpractice claims which they may be threatened with.

Most importantly, the Court of Appeals arrived at its decision by disregarding the basic methodology that a federal court sitting in diversity must follow when deciding a novel question of state law. The Court of Appeal's failure to go through a predictive analysis, marshalling what authority Idaho does have to offer, considering the circumstances of the present litigation and acknowledging the principal that federal courts should be reluctant to expand state law where that law has not provided a clear invitation to do so, represents a deviation from proper judicial procedures so extreme as to call for the exercise of this Court's supervisory powers. If courts such as the Ninth Circuit can content themselves with only the most generalized reference to state law before pursuing their own independent conception of right and wrong, then the great service which the federal courts render when they sit in diversity will be distorted and undermined.

The problem confronting this Court is not whether the Ninth Circuit reached the right or the wrong decision, but that it employed an impermissible methodology in doing so. Herzog believes that it did and that the appropriate remedy is therefore summary reversal rather than full-fledged review. Such a remedy would enable this Court to straight-forwardly and efficiently emphasize to the lower federal courts the basic methodology which must be pursued in diversity cases. If that is not done, it is likely that such courts will habitually expand their enunciations of state law in ways which need only be portrayed as the "natural complement[s]" of existing state law, rather than fair predictions of what that law would be if a different court, such as the Supreme Court of Idaho, confronted the question.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL S. DAMRON, *Plaintiff-Appellant,* v. VERN HERZOG, JR., *Defendant-Appellee.*	No. 94-35043 D.C. No. CV-94-00:05-E/L OPINION

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted January 11, 1995
Submission deferred March 31, 1995
Resubmitted May 23, 1995
Seattle, Washington

Filed September 26, 1995

Before: Eugene A. Wright and Melvin Brunetti, Circuit Judges, and Robert J. Kelleher,* District Judge.

Opinion by Judge Kelleher

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* Honorable Robert J. Kelleher, Senior United States District Judge, for the Central District of California, sitting by designation.

SUMMARY

Attorneys and Judges/Legal Malpractice/Torts

The court of appeals reversed a district court judgment and remanded. The court held that under Idaho law a former client may sue an attorney who later represents an interest adverse to the former client's on a matter that is substantially related to the matter of initial engagement.

In 1982, appellant Paul Damron hired appellee Vern Herzog, Jr., to prepare documents for the sale of Damron's business to Richard, Patricia, Wayne, and Marie Wheatley. As part of the representation, Herzog drafted a Stock Purchase Agreement (1982 SPA) which provided for the Wheatleys to make payments to Damron.

In 1991, the Wheatleys consulted Herzog concerning their obligations under the 1982 SPA. Herzog advised the Wheatleys to discontinue further payments to Damron under the 1982 SPA. After Damron instituted foreclosure proceedings against the Wheatleys, the Wheatleys retained new counsel. The Wheatleys sued Damron, seeking to stay the foreclosure proceedings. The litigation was resolved through a Compromise and Settlement Agreement which included modifications to the original purchase agreement and returned a portion of the business to Damron.

Damron sued Herzog, alleging that Herzog's advice to the Wheatleys proximately caused him damages for legal defense costs incurred in resolving the 1991 conflict

with the Wheatleys. Damron did not act allege that Herzog revealed confidential information to the Wheatleys obtained during Herzog's representation of Damron. The district court granted Herzog's motion for summary judgment. The court held that Idaho law does not recognize a duty, the breach of which is actionable at law, owed by attorneys to their former clients beyond the duty of confidentiality.

Damron appealed. The court of appeals certified a question regarding attorney/client relationships to the Idaho Supreme Court, but that court rejected certification.

[1] The common law contains a continuing duty owed by attorneys to their former clients not to represent an interest adverse to a former client on a matter that is substantially related to the matter of engagement. When the duty is breached, a former client may bring a cause of action at law.

[2] In this case, Herzog was retained by Damron to advise him regarding the sale of his business and draw a contract for the terms of the sale. While the contract was binding, Herzog undertook representation of the Wheatleys, whose interests were directly adverse to Damron's. [3] For purposes of Herzog's adverse representation in a substantially related matter, his attorney-client relationship with Damron was still in effect. [4] Just as the attorney-client relationship remains intact for purposes of a continuing duty of confidentiality, so it remains intact for purposes of a continuing duty of loyalty with regard to matters substantially related to the initial matter of

engagement. Such a result is a natural complement to Idaho law as defined by Idaho courts.

[5] Damron could have brought an action based on a breach of the duty of confidentiality. [6] Because the duty of confidentiality remained intact with respect to Herzog's representation of Damron, the duty of loyalty also continued with respect to those matters substantially related to that representation.

[7] A duty of loyalty to a former client is coterminous with the duty of confidentiality with respect to matters that are substantially related to the initial matter of engagement.

COUNSEL

Allen B. Ellis, Ellis, Brown & Sheils, Boise Idaho, for the plaintiff-appellant.

Mark S. Geston, Eberle, Berlin, Kading Turnbow & McKleven, Boise, Idaho, for the defendant-appellee.

OPINION

KELLEHER, District Judge:

The Idaho District Court held that the state of Idaho does not recognize a general duty of care owed by attorneys to former clients. Accordingly, the district court granted Herzog's motion for summary judgment. Damron appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse and remand to the Idaho District Court for trial.

FACTS

In 1982 Plaintiff-Appellant Paul Damron (Damron) hired Defendant-Appellee Vern Herzog (Herzog) to prepare documents for the sale of Damron's funeral and cemetery business to Richard, Patricia, Wayne, and Marie Wheatley (collectively, "the Wheatleys"). As part of his representation, Herzog drafted a Stock Purchase Agreement (1982 Stock Purchase Agreement), which provided, among other things, for the Wheatleys to make payments to Damron. Herzog did not represent Damron on any further legal matters.

In 1983 Damron sued the Wheatleys regarding tax refunds due in connection with the 1982 sale. The Wheatleys filed a counterclaim against Damron, seeking sums allegedly owed by Damron as a result of advanced payments on funeral services (pre-need contracts). Eventually the counterclaim was dismissed with prejudice and judgment was entered in favor of Damron in February 1987. Herzog did not represent either party in this litigation.

After 1982 Herzog represented the Wheatleys on miscellaneous matters unrelated to Damron. During the first part of 1991, the Wheatleys consulted Herzog concerning their obligations under the 1982 Stock Purchase Agreement. Herzog advised the Wheatleys to discontinue further payments to Damron under the 1982 Stock Purchase Agreement. In addition, Herzog sent a letter to Damron, dated March 29, 1991, detailing the advice he had given to the Wheatleys.[1]

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[1] In this letter, Herzog informed Damron that he had advised the Wheatleys to "discontinue any further payment

As a consequence of the letter, Damron instituted foreclosure proceedings against the Wheatleys. Shortly thereafter, the Wheatleys retained new counsel to advise them about their dispute with Damron. On August 20, 1991, pursuant to the advice of their new counsel, the Wheatleys filed suit against Damron. The Wheatleys' suit sought to stay the foreclosure proceedings on the ground that the Wheatleys were entitled to offsets for undisclosed liabilities, including the pre-need contracts that were the subject of the Wheatleys' previously dismissed counterclaim. This litigation was eventually resolved through a Compromise and Settlement Agreement (Settlement Agreement). The Settlement Agreement included modifications to the original purchase agreement and returned a portion of the business to Damron.

On March 26, 1993, Damron, an Arizona resident, filed a diversity action against Herzog in United States District Court for the District of Idaho. Damron's complaint alleged the facts described above. He further alleged that Herzog's advice to the Wheatleys proximately caused him over $155,000 in damages for legal defense costs incurred in resolving the 1991 conflict with the Wheatleys. Damron did not allege that Herzog revealed any confidential information to the Wheatleys obtained during Herzog's representation of Damron.

On September 7, 1993, Herzog moved for summary judgment. The district court held that Idaho law does not recognize a duty, breach of which is actionable at law,

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under the [1982 Stock Purchase Agreement]" due to the $340,000 in outstanding pre-need contracts allegedly still owed by Damron.

owed by attorneys to former clients beyond the duty of confidentiality.

Finding little guidance in Idaho law, we certified the following question to the Idaho Supreme Court:

> Can a former client maintain an action under Idaho law for damages against an attorney that represents a new client, whose interests are materially adverse to the former client, in a matter that is substantially related to that on which the attorney represented the former client?

The Idaho Supreme Court rejected certification.

DISCUSSION

STANDARD OF REVIEW

Because the Idaho Supreme Court declined to clarify its law regarding attorney/client relationships, we now review *de novo* the district court's grant of summary judgment. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied relevant substantive law. *Id.* We also review *de novo* the district court's interpretation of state law. *Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 1221 (1991).

ANALYSIS

[1] Indisputably, Herzog breached his ethical duty of loyalty to his former client, Damron. *See* Idaho Rule of Professional Conduct (IRPC) 1.9. It is equally undisputed that Damron could have sought either to disqualify Herzog (if Herzog had continued representation of the Wheatleys), or to institute disciplinary proceedings against Herzog. *See, e.g., In re American Airlines, Inc.* 972 F.2d 605, 621-28 (5th Cir.1992) (finding disqualification proper when law firm engaged in impermissible conflicts of interest in substantially related matters), *cert. denied, Northwest Airlines, Inc. v. American Airlines,* 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993); *Idaho State Bar v. Williams,* 893 P.2d 202, 210 (1995) (upholding disbarment imposed for violations of the IRPC). However, Damron's appeal presents us with a more novel problem: whether, under Idaho law, Herzog owed Damron a continuing duty of care as to the same or substantially related matter of Herzog's initial representation of Damron. The district court expressly held that to find such a duty would be to extend current Idaho law "to create a duty to former clients beyond the duty of confidentiality." We reject the district court's conclusion. We do not think that a drastic extension of Idaho law is necessary; rather, we find in the common law a continuing duty owed by attorneys to former clients not to represent an interest adverse to a former client on a matter substantially related to the matter of engagement. When such a duty is breached, the former client may bring a cause of action at law.

A. Attorney-Client Relationship

In order to bring a claim for malpractice, Damron must demonstrate the existence of an attorney-client relationship, a duty with respect to that relationship, breach of such duty, and damages flowing from the breach. *See Johnson v. Jones*, 103 Idaho 702, 706, 652 P.2d 650, 654 (1982).

Damron argues that for the purposes of a malpractice action, an attorney-client relationship existed at the time of Herzog's advice to the Wheatleys in 1991. Damron concedes that ordinarily an attorney-client relationship is terminated once representation has been completed. In this case, however, Herzog interposed himself into a matter substantially related to that for which he was previously retained by Damron. In so doing, Herzog created a situation in which the attorney-client relationship reattaches. Under such circumstances, Damron argues, the duty of loyalty must continue after the representation is complete in the same way the duty of confidentiality continues. Because the duty of loyalty continues in this respect, Damron argues, Herzog should be subject to a malpractice action for breach of that duty. We agree.

[2] The Supreme Court of Idaho has stated that "the scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained." *Johnson*, 652 P.2d at 652. It is clear in this action that Herzog was retained by Damron to advise him regarding the sale of his funeral business and draw a contract for the terms of that sale. Payments under the terms of the contract were to continue until 1997. While this contract was still binding between Damron and the

Wheatleys, Herzog undertook representation of the Wheatleys, whose interests were directly adverse to those of Damron.

[3] For the purpose of Herzog's adverse representation in a substantially related matter, his attorney-client relationship with Damron was still in effect. We find it nonsensical to hold that the attorney-client relationship does not remain intact with respect to matters substantially related to the initial matter of engagement. Such a result is contrary to the basic tenets of attorney-client relationships. The Supreme Court has long held attorneys to stringent standards of loyalty and fairness with respect to their clients. In 1850, the Supreme Court stated:

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

Stockton v. Ford, 52 U.S. (11 How.) 232 (1850).

In the same vein, the Idaho Supreme Court has stated:

> The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in dealing with his client. In the discharge of that trust, an attorney must act with complete fairness, honor, honesty, loyalty, and fidelity in

> all his dealings with his client. An attorney is held to strict accountability for the performance and observance of those professional duties and for a breach or violation thereof, the client may hold the attorney liable or accountable.

Beal v. Mars Larsen Ranch Corp., Inc., 99 Idaho 662, 667-668, 586 P.2d 1378, 1383-1384 (1978) (citation omitted).

[4] Mindful of the historical importance of the public trust in the attorney-client relationship, we find that just as the attorney-client relationship remains intact for purposes of a continuing duty of confidentiality, so does it remain intact for purposes of a continuing duty of loyalty with respect to matters substantially related to the initial matter of engagement. Rather than being a drastic extension of Idaho law, such a result is a natural complement to the law as defined by Idaho courts.

B. Duty of Loyalty Correlative to Duty of Confidentiality

[5] Damron could have brought a cause of action based on breach of the duty of confidentiality. There is support in the law for the contention that where prior and current representations involve the same transaction, access to confidential information by the attorney in the course of the first representation is *presumed*. *See Flatt v. Superior Court*, 9 Cal.4th 275, 283, 885 P.2d 950, 954, 36 Cal.Rptr.2d 537, 541 (1994); *David Welch Co. v. Erskine & Tulley*, 203 Cal.App.3d 884, 891, 250 Cal.Rptr. 339, 342 (1988) ("the actual use or misuse of confidential information is not determinative; it is the *possibility* of breach

which controls") (emphasis added). Due to the grave risk of disclosure, some courts conclude that attorneys simply may not undertake to represent a client whose interests are adverse to those of a former client in matters substantially related to the representation of the former client. *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F.Supp. 265, 269 (S.D.N.Y.1953).

Although confidential information may not have been disclosed, Damron argues that Herzog's advice to the Wheatleys necessarily involved decisions based on confidential information, which inevitably created the risk of a breach.

[6] We agree that when an attorney engages in a conflict of interest on the same matter, he or she is in a position to act on the confidential information learned from the relationship with the first client, whether or not that information is actually disclosed or acted upon in advising the new client. *Maritrans GP, inc. v. Pepper, Hamilton, & Scheetz*, 529 Pa. 241, 254, 602 A.2d 1277, 1283 (1992); *David Welch Co.*, 203 Cal.App.3d at 891. Because this position creates such a grave risk of breach of confidence, it is anomalous to find that the duty of confidentiality does not have as its direct correlation a duty of loyalty. Therefore, because the duty of confidentiality remains intact with respect to Herzog's representation of Damron, the duty of loyalty also continues with respect to those matters substantially related to that representation.

An integral purpose of the rule of confidentiality is to encourage clients to fully and freely disclose to their attorneys all facts pertinent to their cause with absolute assurance that such information will not be used to their disadvantage. *T.C. Theatre Corp.*, 113 F.Supp. at 269; *See also Maritrans*, 602 A.2d at 1283. Allowing Damron's

action to go forward does not place undue restrictions on Herzog's role as an attorney.

We note that our conclusion does not augment any of the obligations attorneys already bear under the rules that govern professional conduct. Under those rules, attorneys are prohibited from adverse representations on substantially related matters. *See* IRPC 1.9. Nor does our conclusion alter the ability of an attorney to engage in representation adverse to a former client after the former client's consent. *See id.* Although we find that, in the narrow realm of the duty of loyalty, an attorney-client relationship continues after formal representation ends, our finding is for the limited purpose of malpractice analysis.

C. Duty of Loyalty Based on Impermissible Conflict of Interest

Damron also argues that he can maintain a cause of action for breach of the common-law duty of loyalty upon which IRPC 1.9 is predicated.[2] Damron concedes that the

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[2] Alternatively, a duty to avoid conflicts of interest may be found in the proposed *Restatements of the Law Governing Lawyers* Comment c to section 72 which states:

> After a client-lawyer relationship ends . . . a lawyer still owes certain duties to a former client, for example, to . . . avoid certain conflicts of interest (§§ 213-214). A breach of such duties may be remedied through a malpractice action in such circumstances coming within this section.

Id.

While the Idaho courts have not adopted the proposed *Restatement*, several other state and federal courts have followed the proposed *Restatement*, albeit in different circumstances. *See,*

preamble of the IRPC admonishes that " 'violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules . . . are not designed to be a basis for civil liability.' " *Weaver v. Millard*, 120 Idaho 692, 697, 819 P.2d 110, 115 (Ct.App.1991) (quoting the preamble to the IRPC). Relying on the Pennsylvania Supreme Court's holding in *Maritrans*, however, Damron argues that he is suing for breach of the common-law fiduciary duty which forms the basis of IRPC 1.9.

In *Maritrans*, the Pennsylvania Supreme Court held that an attorney's subsequent representation of a client, whose interests were materially adverse to a former client in a matter substantially related to that in which he or she represented the former client, was an impermissible conflict of interest, giving rise to breach of a fiduciary duty. 602 A.2d at 1282. The Pennsylvania Supreme Court reasoned that an action at law was available because the common-law fiduciary duty imposed on attorneys prohibited them from engaging in impermissible conflicts of interest. *Id.* at 1283 (citing *Stockton v. Ford*, 52 U.S. (11 How.) 232 (1850); *Woods v. Nat'l Bank & Trust Co.*, 312 U.S. 262, 61 S.Ct. 493 (1941); *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F.Supp. 265 (S.D.N.Y.1953)).

We do not find it necessary to take such a novel approach here. Rather, we find the basis for a continuing duty in the fact that the attorney-client relationship remains intact under certain limited circumstances. Certainly with

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e.g., Petrillo v. Bachenberg, 139 N.J. 472, 483-484, 655 A.2d 1354, 1359-60 (1995).

respect to the specific subject matter of the initial representation, there is a continuing duty of loyalty.

However, the court's holding in *Maritrans* is not inconsistent with the present state of Idaho law. In fact, in *Johnson v. Jones*, the Idaho Supreme Court concluded that "there is a question of material fact as to whether [the defendant-attorney] breached a duty to the [plaintiffs] to disclose the possible conflict of interest involved in drawing up a contract for both the buyer and the seller." 652 P.2d at 654. Although the court ultimately affirmed dismissal of the claim based on plaintiff-appellants' failure to show any triable issue of fact as to causation, the court did not foreclose the possibility of an action at law based on a breach of duty caused by an impermissible conflict of interest.[3]

[7] We need not decide whether the cause of action alluded to in *Johnson* exists. Rather, we find that a duty of loyalty to a former client is coterminous with the duty of confidentiality with respect to matters substantially related to the initial matter of engagement. Accordingly, the judgment of the district court is reversed and remanded for trial.

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[3] In *Beal v. Mars Larsen*, the Supreme Court of Idaho recognized that an impermissible conflict of interest ordinarily exists in a situation where an attorney represents both the buyer and seller in a real estate transaction without the consent of both parties. 586 P.2d at 1384. However, because the attorney in *Beal* was deemed to be merely a "scrivener", the court found that no misconduct had occurred and thus the attorney was not liable for damages. *Id.*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PAUL S. DAMRON,
Plaintiff,

vs.

VERN HERZOG, JR.,
Defendant.

Case No.
CV 93-0105-E-EJL

MEMORANDUM DECISION AND ORDER

(Filed Dec. 9, 1993)

PROCEDURAL BACKGROUND

On March 26, 1993, the plaintiff Paul S. Damron ("Damron") filed a complaint against his former attorney, Vern Herzog, Jr. ("Herzog"). The complaint alleges legal malpractice on the part of Herzog which led to Damron incurring attorneys fees, loss of interest and consequential damages in an amount in excess of $155,000.

On September 7, 1993, Herzog filed a motion of summary judgment and related memorandum in support of the motion. Damron submitted a statement of disputed material facts and opposition brief. On October 6, 1993, Herzog filed a reply brief. The court issued an order setting the hearing for the motion for summary judgment for November 22, 1993, and instructed the parties to submit statements of material facts and points and authorities related to the motion.

On November 17, 1993, Damron filed a supplemental brief in opposition to the motion. Herzog responded by filing a supplemental brief in support of the motion for

summary judgment. A hearing on the motion for summary judgment was held on November 22, 1993, in Boise, Idaho. The court took the motion under advisement.

FACTS

At all times relevant to this matter, Herzog has been an attorney, licensed to practice law in the state of Idaho. In 1982, Damron Herzog as his attorney to prepare documents for the sale of Damron's funeral and cemetery business to Richard Wheatley, Patricia Wheatley, Wayne Wheatley, and Marie Wheatley (collectively referred to as the "Wheatleys"). Herzog's representation included the drafting of the Stock Purchase Agreement which is attached as Exhibit A to the affidavit of Herzog ("1982 Stock Purchase Agreement"). Damron does not allege that Herzog revealed any confidential information to the Wheatleys based on Herzog's representation of Damron during the sale of Damron's business.

After Herzog's representation of Damron in 1982, Herzog did not represent Damron on any further legal matters. In 1983, Damron sued the Wheatleys regarding tax refunds due in connection with the 1982 stock sale ("1983 Litigation"). The Wheatleys filed a counterclaim against Damron concerning advanced payments on funeral services ("pre-need merchandise contracts"), but such counterclaim was dismissed with prejudice in 1986. Judgment was entered in favor of Damron and against the Wheatleys in February, 1987. Herzog was not involved as an attorney in the described 1983 Litigation.

After 1982, Herzog did represent Mr. and Mrs. Richard Wheatley on miscellaneous matters unrelated to

Damron. During the first part of 1991, the Wheatleys consulted with Herzog related to the Wheatleys' obligations under the 1982 Stock Purchase Agreement. The advice given by Herzog to the Wheatleys regarding the 1982 Stock Purchase Agreement was set forth in Herzog's letter dated March 29, 1991, which Herzog sent to Damron.

Shortly after the letter of March 29, 1991, was sent to Damron, the Wheatleys retained new counsel, Fred Blazer ("Blazer"), to advise the Wheatleys in connection with their dispute with Damron. On August 20, 1991, the Wheatleys' new counsel filed suit ("1991 Litigation") against Damron allegedly concerning the same issue contained in the counterclaim filed by the Wheatleys in the 1983 Litigation – pre-need merchandise contracts. The suit specifically sought a stay on the foreclosure proceedings against the Wheatleys on the ground that the Wheatleys were entitled to offsets for undisclosed liabilities – including the pre-need merchandise contracts. The 1991 Litigation was resolved via a Compromise and Settlement Agreement executed on or about June 1, 1992. The settlement agreement included modifications to the original purchase with the cemetery being returned to Damron. Herzog was not involved in the 1991 Litigation.

Damron alleges that the advice of Herzog in the March 29, 1991 letter was negligent in that such letter advised the Wheatleys to discontinue payments under the 1982 Stock Purchase Agreement based on pre-need merchandise contracts and such claims were dismissed with prejudice in 1986 when the Wheatleys counterclaim in the 1983 Litigation was dismissed with prejudice. Damron further alleges that Herzog's advice was the

proximate cause of the Wheatleys hiring Blazer and Blazer's filing of the complaint in the 1991 Litigation. Based on Herzog's briefing, for purposes of this motion for summary judgment, the court can assume the advice given to the Wheatleys by Herzog was negligent.

DISCUSSION

The court has determined that the critical issue which needs to be decided is what duty does an attorney owe a former client regarding a "substantially related matter" and the attorney's current client. Second, if a duty owed is breached, were the damages alleged by Damron proximately caused by the breach by the former attorney. Based on the arguments presented by counsel, there appears to be a genuine issue of material fact as to the proximate causation of the alleged damages and the existence of superseding intervening causes. Alternatively, if no duty has been breached, this court does not need to reach the question of proximate causation, and summary judgment may be granted in favor of the defendant.

Damron clearly was a former client of Herzog's based on Herzog's 1982 representation of Damron regarding the 1982 Stock Purchase Agreement. Rule 1.9 of the Idaho Rules of Professional Conduct does not allow an attorney to represent another person in the same or substantially related matter in which the current client's interests are materially adverse to the interest of a former client without the consent of the former client.

Based on the facts, Herzog did not attempt to receive Damron's consent when Herzog drafted the letter which was later sent to Damron, and the subject matter of such

letter was substantially related to the former representation of Damron. The conflict of interest cannot be denied.

The question then becomes can the failure to obtain Damron's consent serve as the basis for the legal malpractice action when the complaint indicates the source of the negligence is the fact that Herzog should have known about the prior counterclaim involving the pre-need merchandise contracts and should not have advised the Wheatleys to stop making payments under the 1982 stock Purchase Agreement. As stated in plaintiff's supplemental brief, the breach of a professional rule of conduct cannot be the basis for a legal malpractice action. (Supplemental Brief in Opposition to Motion for Summary Judgment, p. 3.)

Based on *Johnson v. Jones,* 103 Idaho 702, 652 P.2d 650 (1982), the elements of a legal malpractice claim in Idaho are as follows:

1. the existence of an attorney/client relationship;
2. the existence of a duty on the part of the lawyer;
3. failure to perform the duty; and
4. the negligence of the lawyer must have been the proximate cause of the damage to the client.

Damron claims the first prong is satisfied since Damron was a former client of Herzog on a substantially related matter. As to the second element, Damron claims that Herzog owed a duty of care to Damron as a former client. Damron asserts it was not unreasonable for Damron to expect and rely on the fact that Herzog would do nothing

to injure him as respects to the Stock Purchase Agreement. Herzog claims that Herzog did not breach any duty owed a former client.

Whether a duty exists raises an initial question of law. *David Welch Co. v. Erskine & Tulley,* 203 Cal. App. 3d. 884, 250 Cal. Rptr. 339 (1988). Idaho cases have not allowed a third party to sue for legal malpractice. In *Bell v. Bell,* 122 Idaho 520, 835 P.2d 1331 (Ct. App. 1992), the court held that a husband did not have standing to raise the issue that the wife's counsel committed malpractice in the divorce proceeding by failing to make reasonable inquiry into the facts of the case and the applicable law. The husband did not have an attorney-client relationship with his wife's counsel and counsel did not violate any duty owed to the husband. Citing *Johnson v. Jones,* 103 Idaho 702, 652 P.2d 650 (1982). Damron distinguishes the *Bell* case by stating that the husband in *Bell* did not have an attorney-client relationship, while Damron did have an attorney-client relationship with Herzog based on his former client status.

The case law and treatises regarding attorney malpractice concerning former clients focuses on whether the attorney breached the fiduciary obligation of confidentiality. *See,* Mallen and Smith, *Legal Malpractice,* (3d ed.), § 13.23 at pp. 803-805; *Cinema 5, Ltd. v. Cinerama, Inc.,* 528 F.2d 1384 (2nd Cir. 1976) (a lawyer's duty to his client is that of a fiduciary). The parties have stipulated that no confidential information was provided by Herzog to the Wheatleys. Therefore, there could be no breach of the duty of confidentiality.

Damron's "reasonable expectation" that Herzog would not act negligently towards another client on the substantially related matter is simply not supported as a recognized duty under the case law. As stated in *Legal Malpractice*, §8.2:

> An attorney can be liable only if a duty to the plaintiff was breached. Thus, an attorney cannot be negligent for failing to do what there was no duty to undertake. A duty is essential to any cause of action and any theory.

Damron cited the court to the line of cases stemming from *Biakanja v. Irving*, 320 P.2d 16 (1958). All of the cases cited by Damron related to legal duties owed to intended beneficiaries of wills or negligent certification by attorneys. This court agrees that will beneficiaries may be owed a duty by an attorney as intended third-party beneficiaries even though no privity exists between the attorney and the heir. Further, the court agrees that if an attorney renders a legal opinion or certification which is intended to be relied upon by third parties (i.e. a securities opinion), then a duty for an accurate opinion runs to the intended third parties. *See, Idaho Bank & Trust Co. v. First Bancorp*, 115 Idaho 1082, 772 P.2d 720 (1989), *citing Credit Alliance Corporation v. Arthur Anderson Company*, 493 N.Y.Supp. 2d 435, 483 N.E. 2d 110 (1985).

In the case at bar, the plaintiff has conceded in his supplemental brief that "he was not an intended beneficiary of defendant's legal services." (Supplemental Brief in Opposition to Motion for Summary Judgment, p. 8.) Additionally, Damron admitted that he had no specific reliance on Herzog's due diligence. (Supplemental Brief in Opposition to Motion for Summary Judgment, p. 8.)

Therefore, the policy considerations supporting the creation of duties to non-clients in the cases cited by Damron are not supported by the facts before this court.

Plaintiff argues that the conflict of interest created by Herzog accepting the Wheatleys as clients should create the policy to support creating a duty to a non-client. This court cannot agree. Plaintiff has conceded that a breach of the Idaho Rules of Professional Conduct does not lay the basis for a common law tort. (Supplemental Brief in Opposition to Motion for Summary Judgment, p. 3.) The creation of the conflict of interest without a corresponding breach of confidentiality cannot be the policy reason for allowing a non-client who is not an intended beneficiary to claim a breach of duty. The Idaho case law as well as the case law of other jurisdiction's does not support the conclusion that Damron's "reasonable expectation" creates a legal duty. All attorneys have a duty not to give negligent advice to their current clients. Such duty of care does not run to non-clients or former clients under the particular facts of this case.

Once a client becomes a former client, however, a lawyer is not barred forevermore from taking positions adverse to that client. *State v. Martinez*, 100 N.M. 532, 673 P.2d 509 (Ct. App. 1983). Once the attorney undertakes representation, the fiduciary obligations and duty of competence continue until the task is completed. Damron terminated his attorney-client relationship when he concluded the drafting of the documents in 1982. There is no allegation that Herzog negligently drafted the documents in 1982. Therefore, the duty of competence owed to Damron terminated when the representation terminated in 1982, and Damron cannot claim Herzog owed Damron a

duty of competence in his advice to the Wheatleys. Since the fiduciary duty was not breached by Herzog, no legal malpractice cause of action against Herzog exists for Damron.

While it is unfortunate that Damron incurred legal expenses related to the lawsuit filed by Blazer, legal representation often results in injury to third persons. As stated in *Legal Malpractice*, § 7.1, p. 361:

> In the litigation context, injury to a third person is often the direct objective of the attorney's representation.

The fact that Damron was sued by another attorney, does not create a duty on the part of Herzog.

CONCLUSION

This court is not charged with having to decide whether the representation of the Wheatleys was in violation of the Idaho Rules of Professional Conduct. The court will leave that determination to the Idaho State Bar. Instead, this court must decide if there is a basis to extend the law to create a duty to former clients beyond the duty of confidentiality. This court declines the invitation of the plaintiff to extend the law for two reasons: 1) the policy considerations for intended beneficiaries does not apply to the facts at hand; 2) the Idaho case law relating to legal malpractice does not recognize such a duty and has followed the line of cases out of New York which specifically limit malpractice claims by those other than the current client; and 3) the court's fear of opening the floodgates of litigation to non-client attorney malpractice

cases if a new duty is created based upon a mere expectation.

Based on the above discussion, this court finds that Herzog did not breach the fiduciary duty owed to Damron as a former client or any other legal duty which would create a common law tort even though a conflict of interest did exist between the Wheatleys and Damron. Therefore, summary judgment in favor of the defendant should be granted by the court. Since no breach of duty was established by plaintiffs, the court does not need to address the issue of proximate causation.

ORDER

The court, being fully advised in the premises, hereby orders that the defendant's motion for summary judgment is **GRANTED** and the case is **DISMISSED.**

Dated this 9th day of December, 1993.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES
DISTRICT JUDGE

CLERK'S CERTIFICATE

I hereby certify that true and correct copies of the above and foregoing **MEMORANDUM DECISION AND ORDER** were forwarded to the following-named persons on this 9th day of December, 1993:

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CAMERON S. BURKE, CLERK

By: /s/ Carol Vaughn
Deputy Clerk

Case No. CV 93-0105-E-EJL
Damron v Herzog

APPENDIX C

Order of the Supreme Court of the State of Idaho adopting the Rules of Professional Conduct, together with the "Preamble" thereof, adopted June 25, 1971 and effective November 1, 1986.

In the Supreme Court of the State of Idaho

IN RE: ADOPTION OF	)	ORDER ADOPTING
IDAHO RULES OF	)	IDAHO RULES OF
PROFESSIONAL CONDUCT	)	PROFESSIONAL
(I.R.P.C.)	)	CONDUCT
	)	

The Idaho State Bar having recommended the adoption of the Idaho Rules of Professional Conduct setting forth the standards of conduct for members of the Idaho State Bar; and the Rules having been approved by resolution of the members of the Bar; and the Court having reviewed the Rules and having determined that they should be adopted as amended.

NOW, THEREFORE, IT IS HEREBY ORDERED, that the Code of Professional Responsibility for members of the Idaho State Bar be, and it is hereby, rescinded, and that the Idaho Rules of Professional Conduct (I.R.P.C.) in the form attached to this Order be, and the same are hereby, adopted as the rules governing the Idaho State Bar and its members.

IT IS FURTHER ORDERED, that this Order and the Idaho Rules of Professional Conduct shall be effective commencing November 1, 1986.

IT IS FURTHER ORDERED, that the Idaho State Bar cause a copy of this Order to be published in one issue of the Advocate and to make copies of this Order and the Idaho Rules of Professional Conduct available at its office for attorneys, judges and any other interested members of the public.

DATED this 3rd day of September 1986.

By Order of the Supreme Court

/s/ Charles R. Donaldson
Charles R. Donaldson,
Chief Justice

ATTEST: /s/ Frederick C. Lyon
Clerk

IDAHO RULES OF PROFESSIONAL CONDUCT
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PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As

negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful

of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person

while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing

their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may", are permissive and define areas under the Rules in which the lawyer has professional discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedure law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon

understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other

government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there has been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the

administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern of affect judicial application either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The

Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of such Rule is authoritative.

TERMINOLOGY

"Belief" or "Believes" denote that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "Law Firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to appraise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

IDAHO RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In

a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a manner and promptly comply with reasonable requests for information.

* * *

Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formally represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

* * *

(2)

Supreme Court, U.S.
FILED
FEB 5 1996
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No. 95-1006

In The

Supreme Court of the United States

October Term, 1995

VERN HERZOG, JR.,

Petitioner,

v.

PAUL S. DAMRON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Petition for Writ of Certiorari of Petitioner, Vern Herzog, Jr., ("Herzog") was docketed on December 25, 1995. On January 29, 1996 counsel for Herzog received in the mail the latest, Fourth Edition of Mallen & Smith, *Legal Malpractice* (1996), from the publisher, West Publishing Company. As shown in his original Petition, Herzog had relied on § 16.23 of the Third Edition of *Legal Malpractice* in both the District and the Ninth Circuit Court of Appeals to support his argument that a former client could bring an action at law for damages against his former attorney only when there has been a breach of some confidence. The District Court agreed with this authority and granted summary judgment (*see* Herzog's Petition for Writ of Certiorari, App. 21), but the Ninth Circuit did not mention that authority at all when it reversed.

The Fourth Edition of *Legal Malpractice* restates the proposition upon which Herzog relied and cites additional case authority to support it. Moreover, the treatise strongly criticizes the Ninth Circuit's decision herein:

> The Court of Appeals for the Ninth Circuit rendered a unique and questionable decision in 1995 concerning an Idaho lawyer, who represented a seller of a funeral business in 1982. In 1991 the lawyer advised the buyers to terminate their obligation under the agreement.[7] [fn. 7 at p. 485; Damron v. Herzog, 67 F.3d 211 (9th Cir. 1995).] Litigation followed between the buyers and seller in which the former client prevailed. He then sued the lawyer for the cost of that litigation. The court held that a cause of action

was stated, finding a "continuing" attorney-client relationship during the time the payments continued:

> We do not think that a drastic extension of Idaho law is necessary; rather, we find in the common law a continuing duty owed by attorneys to former clients not to represent an interest adverse to a former client on a matter substantially related to the matter of engagement. When such a duty is breached, the former client may bring a cause of action at law.[8] [fn. 8: *Id.* at 214-215. The court also said:
>
> > "Damron argues that for the purposes of a malpractice action, an attorney-client relationship existed at the time of Herzog's advice to the Wheatleys in 1991. Damron concedes that ordinarily an attorney-client relationship is terminated once representation has been completed. In this case, however, Herzog interposed himself into a matter substantially related to that for which he was previously retained by Damron. In so doing, Herzog created a situation in which the attorney-client relationship re-attaches. Under such circumstances, Damron argues, the duty of loyalty must continue after the representation is complete in the same way the duty of confidentiality continues. Because the duty of loyalty continues in this respect, Damron argues, Herzog should be subject to a malpractice action for breach of that duty. We agree."

> The attorney-client relationship ended. The logic is doubtful that it could "reattach" in some metaphysical manner. Although there is an appearance of impropriety in a lawyer acting adversely to a client once represented on the same subject matter, the duty to be protected is confidentiality, not loyalty.]
>
> The court said that "a duty of loyalty to a former client is coterminous with the duty of confidentiality with respect to matters substantially related to the initial matter of engagement." The conclusion, however, not only is illogical but was unnecessary. The court could have rested its decision on the lawyer's obligation of confidentiality, which precludes both disclosure and misuse of confidential information. Then, the former client would have to prove the misuse of confidential information, which caused injury, subjects on which the court's opinion is silent.

2 Mallen & Smith, *Legal Malpractice* (4th Ed.), § 16.23 at p. 485.

Herzog based his Petition for Certiorari on the fact that the Ninth Circuit Court of Appeals ignored relevant state law which could have enabled it to predict how the Idaho Supreme Court would decide the question at hand. Instead, the Ninth Circuit merely cited general principles of law and then applied its own logic to justify reversing the District Court. It is, therefore, not so much that Herzog believes the Ninth Circuit was wrong in the decision it reached, but that the Court of Appeals ignored the basic methodology which all federal courts sitting in diversity must adhere to.

Comparison between this latest edition of *Legal Malpractice* and the decision the Ninth Circuit emphasizes the latter's failure to review any of the available cases to predict what Idaho's decision would have been had this case been in its courts. This failure is clearly illustrated by the fact that only one of the cases cited by the treatise in § 16.23 to support its analysis of the liability of former attorneys to former clients for legal malpractice, appears in the Ninth Circuit's decision: *Maritrans G.P. v. Pepper, Hamilton & Scheetz*, 529 Penn. 241, 602 A.2d 1277 (1992). *See*, Herzog's Petition for Certiorari, App. 12, 14 and 15; 2 Mallen & Smith, *Legal Malpractice* (4th Ed.), § 16.23 at p. 483, fn. 1. And then, it must be noted, the treatise cited the *Maritrans* case only as an example of how, for one reason or another, "attorneys are being sued for legal malpractice arising from adverse representation against former clients or from untimely disqualification." 2 Mallen & Smith, *Legal Malpractice* (4th Ed.), § 16.23 at p. 483. Otherwise, none of the considerable body of authority which the treatise marshals to analyze the precise issue at bar appears in the Ninth Circuit's opinion. Such studied neglect of readily available sources of scholarly and judicial authority which could have helped predict how the state of Idaho would have decided the question at hand is strong and unbiased commentary on how far the Ninth Circuit Court of Appeals departed form the accepted and usual course of judicial proceedings, such that the exercise of the Supreme Court's supervisory power is now called for. Herzog believes that the

most efficient way to exercise this power is by the summary reversal of the Ninth Circuit's decision.

Respectfully submitted,

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